IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1204 of 1985

with

CRIMINAL APPEAL No 1205 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

MANIYABHAI GAVJIBHAI

Appearance:

1. Criminal Appeal No. 1204 of 1985
MR.K.C.SHAH A.P.P. for Petitioner
MR DR BHATT for Respondent No. 1

2. Criminal AppealNo 1205 of 1985
MR.K.C. SHAH A.P.P. for Petitioner
MR DR BHATT for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL

and

MR.JUSTICE D.P.BUCH

Date of decision: 23/03/2001

COMMON JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

1. The respondent was tried for the offence punishable under Section 302 of the Indian Penal Code, by the learned Additional Sessions Judge, Valsad at Navsari in Sessions case No.7/85. By judgement dated January 10, 1985, the learned Judge has acquitted the respondent of the offence punishable under Section 302 of Indian Penal Code, but convicted him under Section 323 of Indian Penal Code and granted benefit of probation under Section 4 (1) of the Probation of Offenders Act, 1958 by releasing him on his entering into a personal bond in the sum of Rs.750/- and directing him to be of good behaviour and not to leave the village in which he was residing without permission of the Court for a period of two years from the date of the judgment. Criminal Appeal No.1204/85 is filed by the State of Gujarat under Section 377 of the Code of Criminal Procedure, wherein it is pleaded that the sentence imposed on the respondent for the offence punishable under Section 323 of the Indian Penal Code is inadequate and should be suitably enhanced for the reasons indicated in the memorandum of appeal. In Criminal Appeal No.1205/85, the State has questioned acquittal of the respondent of the offence punishable under Section 302 of the Indian Penal Code. As common questions of facts and law arise for our consideration in these two appeals, we propose to dispose of them by this common judgment.

2. The incident in question is alleged to have taken place on November 16, 1985, at about 16 hours at village Nani Tambadi, Taluka Pardi, District Valsad. Ramubhai Bhanabhai of village Nani Tambadi, had given contract to cut babul trees belonging to him to deceased Mania Durlabh, Raichand Manji, Bahadur Sukha and the respondent. Ramubhai Bhanabhai had given Rs.50/- each to the above referred to four persons. The respondent had lost money given to him and he suspected that deceased Mania Durlabh had taken away the money given to him by Ramubhai Bhanabhai. It is the case of the prosecution that after three days of giving of Rs.50/- each to the above referred to four persons, the respondent had assaulted the deceased with a stick and gave a blow on the left side of the chest of the deceased at his house

when the deceased was taking lunch. The prosecution case is that when deceased was being assaulted by the respondent, his wife Niruben Maniabhai had intervened, as a result of which the deceased had escaped from his house. According to the prosecution, in the evening on the same day, the respondent had gone to the house of Keshavbhai who is the brother of the deceased, but keshavbhai had persuaded the respondent not to quarrel with the deceased and return to his home. The prosecution claims that on the same day when deceased returned home he informed his brother Keshavbhai that the respondent had caused injury on his chest and also waist by teeth bite. The prosecution has averred that on the next day, the deceased was taken to dispensary for treatment by Keshavbhai and deceased died on November 4, 1984. On the death of the deceased, Keshavabhai lodged complaint with Vapi Police Station under Section 302 of the Indian Penal Code. The First Information Report lodged by Keshavbhai was investigated by Mr.B.V. Ramani who was then the Second Police Sub Inspector at Vapi Police Station. At the conclusion of the investigation the respondent was chargesheeted for the offence punishable under Section 302 of the Indian Penal Code. As the offence punishable under Section 302 of the Indian Penal Code is exclusively triable by Court of Sessions, the case was committed to Sessions Court Valsad at Navsari, where it was registered as Sessions Case No.7/85. The learned Judge framed charge against the respondent at Exh.2 for the offence punishable under Section 302 of the Indian Penal Code. The charge was read over and explained to the respondent who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore examined; (1) Dr.Birendra R. Pandey as P.W.1 at Exh.7, (2) Pushpakant M. Bhatt as P.W.2 at Exh.9, (3) Dr.Chhotu Jamnabhai Patel as P.W.3 at Exh.10, (4) Keshavbhai Durlabh as P.W.4 at Exh.11, (5) Niruben Maniabhai as P.W.5 at Exh.12, (6) Rasuben Gandabhai as P.W.6 at Exh.19, (7) Ramubhai Bhanabhai as P.W.7 at Exh.20, (8) Bhadurbhai Sukhabhai as P.W.8 at Exh.21, (9) Barjulbhai Bhikhabhai as P.W.9 at Exh.22, (10) Parsuram V. Deesar as P.W.10 at Exh.23 and (11) Babulal V. Ramani as P.W.11 at Exh.25 and also produced documentary evidence such as postmortem notes of the deceased, complaint filed by Keshavbhai, panchnama of place of occurrence, discovery panchnama etc., to prove its case against the respondent. After recording of evidence of prosecution witnesses was over, the learned Judge recorded statement of the respondent under Section 313 of the Code of Criminal. In his statement, under Section 313, the respondent denied the case of the prosecution, but did not examine any witness in support

of his defence. On appreciation of evidence lead by the prosecution, the learned Judge held that offence punishable under Section 302 of the Indian Penal Code was not made out against the respondent but he had committed offence punishable under Section 323 of the Indian Penal Code. The learned Judge has therefore acquitted the respondent of the offence punishable under Section 302 of the Indian Penal Code but convicted him of the offence punishable under Section 323 of the Indian Penal Code and granted benefit of probation under Section 4 (1) of the Probation of Offenders Act, 1958 by releasing him on his entering into a personal bond in the sum of Rs.750/- and directing him to be of good behaviour and not to leave the village in which he was residing without permission of the Court for a period of two years, by the impugned judgment giving rise to the present appeals.

3. Mr.K.C. Shah, learned A.P.P., after taking us through the entire evidence on record submitted that the evidence of witness Niruben Maniabhai read with the evidence of witness Rasuben establishes that the respondeat had caused injury with stick on the left side of the chest of the deceased as a result of which he died and therefore the respondent ought to have been convicted by the learned Judge of the offence punishable under Section 302 of the Indian Penal Code. In the alternative the learned counsel submitted that having regard to the manner in which the incident had taken place and the injuries sustained by the deceased, the respondent after being convicted under Section 323 of the Indian Penal Code should not have been released on probation of good counduct and the sentence imposed by the learned Judge on the respondent for the offence punishable under Section 323 of the Indian Penal Code being inadequate should be suitably enhanced by this Court. None appears on behalf of the respondent.

4. We have taken into consideration the submissions advanced by the learned A.P.P. as well as the evidence on record. The evidence of Dr.Birendra R. Pandey who had performed autopsy on the dead body of the deceased would indicate that the deceased had swelling on upper portion of left side chest as well as swelling on lumber region part of chest above the niple and also swelling on right side back above lumber region. According to the Doctor, the injuries were caused to the deceased before a week and he had performed postmortem on the dead body on December 5, 1985. The Doctor further stated before the Court that the right lung was found congested and having slight watery fluid; whereas in left lung air passages had undergone pentrificative changes and the left lung

was found in liquid pus form and was giving out foul smell. The Doctor opined that cause of death was asphyxia resulting due to left lung having undergone pentrificative changes and air passages of the right lung having watery fluid in it. However, in paragraph 5 of his deposition the Doctor stated that injuries might have been caused to the deceased 18 days before the date on which postmortem was performed. The Doctor specifically opined that injuries found on the deceased were not sufficient in the ordinary course of nature to cause his death. In cross examination by defence the Doctor admitted that he was not bale to state firmly and positively that the injuries could have been caused 18 days prior to the date of performance of postmortem. The Doctor agreed with the suggestion made by the defence to the effect that if someone is assaulted with stick like muddamal article No.1 with force the ribs would have been fractured. He also agreed with the suggestion made by the defence that the swelling found on the dead body of the deceased was also possible because of a fall. According to the Doctor if immediate medical aid had been made available to the deceased, the deceased would not have expired. The evidence of Dr.Chhotu J. Patel and Dr.Pushpakant M. Bhatt before whom the deceased was taken for treatment indicates that they had not treated or examined the deceased and therefore we do not find it necessary to discuss their evidence in detail. The evidence of Doctor Birendra R. Pandey shows that the deceased had sustained injuries a week before the postmortem was performed on his dead body. The medical evidence further makes it clear that the injuries sustained by the deceased were not sufficient in the ordinary case of nature to cause death. Moreover, according to the Doctor, the injuries were also possible by a fall. Under the circumstances, we are of the opinion that the learned Judge rightly concluded that offence punishable under Section 302 of the Indian Penal Code was not made out by the prosecution. The question still remains to be considered whether the respondent was author of the injuries sustained by the deceased and in order to prove that the respondent had caused injuries to the deceased, the prosecution has relied upon evidence of Niruben Maniabhai and Rasuben Gandabhai. Though Niruben Maniabhai in her examination-in-chief has maintained that respondent had assaulted the deceased with stick on left chest while deceased was taking lunch and had also caused injuries to him by means of teeth bite, we are of the opinion that in fact she was not present at the time when deceased was assaulted and her evidence does not inspire confidence. According to this witness the respondent had given forceful blow with stick. If the deceased had been

given forceful blow with stick by the respondent, the deceased would have sustained fracture of ribs as informed by Dr.Birendra R. Pandey, but admittedly, no fracture of ribs was found at all. This witness was confronted with her earlier police statement and the contradiction proved would indicate that witness Niruben had not stated before the police that the respondent had assaulted the deceased while deceased was taking lunch. This witness had also not stated in her police statement that the respondent had caused injuries to the deceased by means of teeth bite. Moreover, the witness had never stated in her statement that at the time when deceased was assaulted her paternal mother-in-law was present. Thus story told by this witness in examination-in-chief stands demolished with reference to her police statement and in view of material improvements made by the witness during her examination in chief before the Court and material omissions made by the witness in her police statement, we are of the opinion that she doe not appear to be a witness of truth and cannot be relied upon for the purpose of fastening responsibility on the respondent for causing any injury to the respondent. Witness Rasuben Gandabhai in her examination-in-chief though claimed that she had seen the deceased being assaulted by the respondent, in cross examination, she has admitted that at the time when the incident took place she was in field and when she entered the house on hearing shouts raised by Niruben, deceased had already left the house and the respondent was also not present. Cross examination of this witness makes it clear that she had not witnessed the incident at all and had learnt about the incident only from Niruben. Such a got up witness can never be relied upon for the purpose of concluding that the respondent was author of injuries caused to the deceased. Evidence of Keshavbhai who is brother of the deceased would show that he was informed by deceased that the respondent had caused injury on his left chest and by means of teeth bite. We may state that Keshavbhai had lodged complaint with Vapi police station on the basis on which investigation was made by the Senior Police Sub Inspector of Vapi police station. This witness in his cross examination admitted that he had not stated in his complaint that his brother was assaulted by the respondent with stick nor had stated that the respondent had threatened to kill his brother. Therefore, the evidence of this witness also does not establish any case against the respondent. The evidence of Dr.Pandey shows that the deceased had sustained injuries a week before the autopsy was performed. It means that the incident must have taken place on or about November 28, 1985 and not on November 16, 1985 as claimed by so called eye

witnesses. Except the evidence of above referred to three witnesses, the prosecution has not led any evidence to establish that the respondent was author of the injuries caused to the deceased. Moreover, according to the prosecution the incident in question had taken place on November 16, 1984; whereas, the deceased had expired on December 4, 1984, and Keshavbhai who is the brother of the deceased had lodged First Information Report only on December 5, 1984. Thus there is delay in filing the complaint which is not explained satisfactorily by the prosecution witnesses. On overall view of the matter, we are of the opinion that the prosecution has failed to prove its case against the respondent even under Section 323 of the Indian Penal Code. As the prosecution has failed to prove its case against the respondent under Section 323 of the Indian Penal Code there is no question of enhancing sentence imposed on him. As discussed earlier, the prosecution has failed to prove that offence under Section 302 of the Indian Penal Code was made out, and therefore, acquittal appeal also cannot be accepted.

5. For the foregoing reasons both the appeals fail and are dismissed. The respondent is acquitted of the offence punishable under Section 323 of the Indian Penal Code. The directions given by the learned Judge while granting benefit of probation under the provisions of the Probation of Offenders Act, 1958, are also hereby set-aside.

(J.M. Panchal, J).

(D.P. Buch, J).

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